Def's Brief.

Brief of Winston for D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Plaintiff in Error,
vs.
PATRICK HENRY WINSTON,
Defendant in Error.

No. 105.

In Error to United States Circuit Court of Appeals for the Ninth District.

BRIEF OF DEFENDANT IN ERROR.

PATRICK H. WINSTON and
ALEX. H. WINSTON,
Attorneys for Defendant in Error.

Press of Pioneer Printing and Stationery Co., Spokane.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, Plaintiff in Error.	
vs.	No. 205.
PATRICK HENRY WINSTON, Defendant in Error.	

DEFENDANT IN ERROR'S BRIEF.

STATEMENT.

We desire to add nothing to plaintiff in error's statement except to say that the only matters now in controversy are as to the items of $250, $310 and $187.21, being a total of $747.21. These charges were for services in the circuit court of appeals sitting outside of defendant in error's district. It is conceded that the services were rendered by direction of the Attorney General. For these services defendant in error presented his bill to the United States. It

was approved and allowed by the Judge of the Circuit Court and by the then Attorney General of the United States, but the Treasury officials refused payment.

ARGUMENT.

Can defendant in error recover for services performed in the Circuit Court of Appeals at San Francisco, outside of his own district, when the services were rendered at the express direction and command of the Attorney General? We think the question should be answered in the affirmative.

The question is barren of authority for the reason that, prior to the time Mr. Winston became the victim of the ruling of the Treasury Department, accounts similar to his were paid without controversy.

We will therefore discuss the question upon principle.

I.

When defendant in error became the attorney of the Government, he accepted certain employment with statutory compensation therefor, and the laws governing his compensation applied to the duties then existing. The Circuit Court of Appeals was created

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after that time and it cannot be presumed that defendant in error accepted his office with any knowledge that he would be compelled to go to San Francisco on behalf of the Government. The well known rule would therefore obtain, that when, during the term of a public officer, additional and new duties are imposed upon him, he is entitled to extra compensation therefor. Therefore we take it to be the law that unless there is a clear, definite and emphatic statutory provision, applicable to this case, forbidding the payment of these fees, that good law, morals and justice demand that Mr. Winston should receive the money honestly earned. These United States cannot afford to appropriate the services of one of its citizens and then refuse to compensate him for them. The laborer is worthy of his hire even where the government is the employer.

II.

Again, even if the statutes (Sec. 365 R. S. and others) do forbid, as is contended by plaintiff in error, Mr. Winston being paid for his services, they were enacted prior to the law creating the Circuit Court of Appeals and cannot be held to apply to compensation for services rendered in that Court. There being no provision in the Act for compensation, the rule of

quantum meruit should prevail and as there is no dispute as to the value of his services he should recover, especially as the amount claimed is the amount allowed by the Attorney General.

A private employer under similar circumstances would be liable and the Government should not have any different rule applied to its contracts.

III.

But let us see what the statutes do say upon this question.

1st. Section 771 R. S. makes it the duty of every district attorney to prosecute in his district . . . all civil actions in which the United States are concerned.

This, therefore, made it the duty of Mr. Garter, the District Attorney of California, to appear and therefore it could not be Mr. Winston's to do so.

2nd. This being true, then the presumption arises that when commanded to perform these services by the Attorney General, the Government is liable to him for compensation therefor.

We contend that the amounts sought to be recovered are not fees but compensation, but if the

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Court holds they are fees, then Sec. 299 R. S. provides:

"All accounts of the United States District At-
"torneys for services rendered in cases instituted in
"the Courts of the United States, or of any State,
"when the United States is interested, but is not a
"party of record, or in cases instituted against the
"officers of the United States,or their deputies, or
"duly appointed agents for acts committed or omit-
"ted or suffered by them in the lawful discharge of
"their duties, shall be audited and allowed as in oth-
"er cases, assimilating the fees, as near as may be,
"to those provided by law *for similar services*
"in cases in which the United States is a party."

And the only services similar to those for which he seeks a recovery are rendered by attorneys specially retained on behalf of the Government in particular cases.

For such services the Attorney General is allowed to fix the amount of compensation. And in this manner his charges were correctly assimilated by virtue of Section 299.

IV.

It is suggested in the brief of plaintiff in error that Mr. Winston cannot recover because the Attorney General did not especially appoint him Assistant U. S. Attorney, nor did he certify that the District Attorney of California could not have attended to the cases.

However that may be, Mr. Winston was ordered to go to California. He did go. He could not know in what capacity he was ordered to go. He simply obeyed instructions. He could not do otherwise. And because of a failure of the Attorney General, over whom of course Mr. Winston had no control, to do certain acts it is contended that the Government, after accepting Mr. Winston's services, can now refuse to pay him. This is not the law.

V.

Briefly stating our position:

The Government has accepted Mr. Winston's services. It now says: Although we sent him to San Francisco, he cannot be paid as District Attorney because he should have disobeyed our command to go, and he cannot be paid as special counsel because the

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Attorney General failed to issue *after the services were rendered*, some technical certificate.

It is not justice and it surely cannot be the law that the Government can appropriate a citizen's property and refuse to pay for it, saying:

1st. We had no right to take his property and therefore we will keep it and will not pay for it.

2nd. We had a right to take his property; we did take it but we will not pay for it. Why? Not because it was not worth the price, not because of any default of the citizen, but solely because, after we had taken the property, our law officer omitted, or neglected, to his duty.

VI.

But there is still another ground why the judgment should be affirmed, and we believe a careful examination of the record will convince the Court of the soundness of our position. The points presented by plaintiffs in error cannot be considered by the Court because there is, and we say it with confidence, absolutely nothing in the record to show that the Attorney General did not follow whatever rule of law governs this, in allowing defendant in error's accounts.

The judgment of the lower court should be affirmed.

Respectfully submitted,

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